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State grievance mechanisms and the role



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STAFF REPORT NO. 1

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STATE GRIEVANCE MECHANISMS AND THE ROLE OF THE BOARD OF PERSONNEL APPEALS

Objective: To provide information to the Personnel and Labor Relations Study Commission on Study Question 1.

- Part 1: Should the Board's statutory grievance appeal mechanism be continued?
- Part 2: Are statutory grievance appeal mechanisms for employees of only two state agencies unfair to other employees?
- Part 3: Does the responsibility for both employee grievances and unfair labor practices result in confusion of roles?

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responsible for

1/15/91

I. INTRODUCTION

The intent of this paper is to examine the various state grievance processes and the role of the Board of Personnel Appeals in those grievance processes.

More specifically, this paper will look at:

1. Current grievance procedures;
2. the role of the BPA in hearing grievance appeals from the Departments of Fish, Wildlife and Parks and Highways;
3. the role of the Merit System Council in hearing appeals from employees of Merit agencies;
4. problems with and comments on current grievance procedures;
5. a brief summary of some procedures from other states;
6. options the commission may consider; and
7. additional information required.

The entire issue of what grievance mechanism should ultimately be recommended cannot be decided without additional information, in the opinion of this researcher. The additional information required is discussed in the final section of this paper.

II. CURRENT GRIEVANCE PROCEDURES

There are several different types of standard grievance procedures for different groups of state employees as well as specialized procedures for special grievances. This array of procedures includes the normal division between negotiated procedures and non-negotiated procedures, but also includes an unusual variety of non-negotiated procedures as listed below:

A. Negotiated grievance procedures:

Each of the state's negotiated contracts contains a grievance procedure. These procedures include a series of steps which are much like those in the grievance procedure established by state policy. The major difference is that negotiated grievance procedures include final and binding arbitration as the final step for employees who are dissatisfied with the decision of the department director.

When an aggrieved employee or employees and their association bargaining agent consider the decision of a department director to be unsatisfactory, notification of the intent to have the grievance referred to arbitration is made. In some cases, the

Board of Personnel Appeals may provide lists of arbitrators. All arbitrators file their decisions with the board. The decision of the arbitrator is final and binding.

As indicated in the staff paper on the scope of authority of the Board of Personnel Appeals, the Board itself is hearing a number of grievances as unfair labor practices when requested to do so.

B. Standard grievance procedures for unorganized state employees established by state policy:

The state grievance policy was adopted to deal with complaints by any state employee, but is generally only used by unorganized employees. The policy allows appeals to increasingly higher levels of management by a grievant. There are no figures available on use of the procedure, but the perception is that its use is extremely low. The steps of the procedure are:

1. informal resolution at the lowest management level possible, usually the immediate supervisor;
2. formal notice to management of the grievance;
3. a hearing committee consisting of one member appointed by the employee, one member appointed by management and a third member who is acceptable to the other two members; this committee makes recommendations to the department director;
4. the department director or agency head is the final level of appeal unless the complainant pursues the grievance into district court.

Some agencies which use this procedure have modified it to add levels of appeal or to change time periods provided in the policy, but the basic structure is retained.

C. Standard grievance procedure for employees in merit positions:

Employees covered by Merit System principles use the state's standard grievance procedure prescribed by state policy but with an added step. Merit System employees may appeal most standard grievances to the Merit System Council for a final decision.

D. Standard grievance procedures for employees in Fish, Wildlife and Parks and Highways:

The Departments of Fish, Wildlife and Parks and Highways also use the standard grievance procedure prescribed by the state grievance policy, but with an added step. Employees of these two agencies may appeal a decision of the department director to the Board of Personnel Appeals.

E. Special classification grievance procedures:

An employee who feels he has been aggrieved by the state classification process may seek informal resolution or follow the formal four step appeal process. The first step is appeal to the immediate supervisor; the second step to the department head; the third step to the Personnel Division for review; and the final step is an appeal to the Board of Personnel Appeals. The process is found in Rule ARM 24.26.508.

F. Special discrimination grievance procedures:

An employee alleging unlawful discrimination may file a complaint with the Human Rights Commission, regardless of whether the employee has elected to implement any other grievance process. Such a complaint may be filed concurrently with any internal agency grievance or discrimination procedure or may be filed following resolution of an agency procedure.

III. THE GRIEVANCE APPEAL ROLE OF THE BOARD OF PERSONNEL APPEALS

A. History:

1. Highways:

According to Highway Department sources, the idea of providing an outside appeal body came from the researcher assigned to the department during executive reorganization, and it was adopted. The Board of Personnel Appeals assumed the duty of hearing those grievances in approximately 1974.

The authority for appeals to the Board of Personnel Appeals is found in Sections 2-18-1001 through 2-18-1003, MCA. (See appendix.)

2. Fish, Wildlife and Parks:

In 1977, the Legislature approved a bill which allowed employees of Fish, Wildlife and Parks to appeal grievances to a board to be designated by the Department of Administration. The Board of Personnel Appeals was the only board available to hear such grievances and was so designated. In 1979, the statute was amended to make the Board of Personnel Appeals the grievance board for the department.

The authority for appeals to the Board of Personnel Appeals is found in Section 87-1-205, MCA. (See appendix.)

B. Operation of procedures:

1. Highways:

Once an employee of the department has exhausted all administrative remedies, he may file a grievance with the board on a standard appeal form. Board staff conducts a preliminary investigation and the grievance may be resolved on the investigator's finding.

If the results of the preliminary investigation are not acceptable to either party, the grievance goes to a formal hearing before a board hearings examiner. The examiner makes a recommendation for a final order in the case. If this order is not acceptable to either party, oral arguments are scheduled before the full board, which then issues a final decision.

The decision of the Board of Personnel Appeals may be appealed to District Court by either party. The Board may also enforce its order through District Court.

2. Fish, Wildlife and Parks:

Employees of Fish, Wildlife and Parks may file grievances in narrative form. There is no formal grievance form.

The procedure for this agency does not include the preliminary investigation stage. The procedure starts with the formal hearing level and proceeds in the same manner as the Highway procedure, until the board has issued its order.

As for Highways, the Board of Personnel Appeals has the authority to go into District Court to have its order enforced.

C. Caseload:

1. Highways:

Four to six grievances have been appealed to the board, mainly involving failure to promote, according to department attorney Jack Holstrum. He believes part of the reason for the low number is the fact that employees of the department are heavily organized and elect to use their union procedure.

2. Fish, Wildlife and Parks:

Four cases have gone to the board since department employees have had the right to appeal, all involving terminations.

IV. THE GRIEVANCE APPEAL ROLE OF THE MERIT SYSTEM COUNCIL

A. History:

Federal merit principle number 5 requires that permanent employees who are separated or demoted must have the right to appeal through an impartial process. In addition, an impartial process must be provided to hear appeals of alleged discrimination from both employees and applicants. The Merit System Council was established to implement this and other merit principles for state employees in positions supported by federal funds which are conditional on compliance with merit principles.

The authority for the Merit System grievance and appeal process is found in 2.23.702 and 2.23.703 of the Administrative Rules of Montana. (See appendix.)

B. Operation of procedures:

Employees of Merit System agencies must exhaust all internal administrative remedies before they may take an appeal to the Merit System Council. Permanent employees who have been reclassified, demoted, suspended, dismissed, separated through a reduction in force, denied reinstatement when the employee's previous class of position is open or any employee who alleges that he or she has been subject to discrimination may appeal.

The rules establish the time frames in which appeals must be filed. In all cases, except alleged unlawful discrimination, one member of the council may hear the case and render a decision. In cases of alleged discrimination, the full council hears the case.

The rules provide that the decision of the council is final and binding on the agency and the employee, but does not preclude either party from appealing the decision to District Court.

Applicants and eligibles who allege unlawful discrimination . . . who have been found ineligible to take examinations, who fail examinations or who have been removed from a register may also appeal and have a hearing before the council.

C. Caseload:

In the past five years there have been only two formal and three informal hearings before the Merit System Council.

V. PROBLEMS AND COMMENTS

This section will summarize comments on and problems identified with current grievance and appeals procedures.

A. State grievance policy:

The major problems with the state policy which have been identified involve the roles of the hearing committee and the fact that the final decision rests with the department director.

1. Hearing committee:

State managers complain that there are no limits set on matters the committee may consider. Consequently, committees may make recommendations to the department director which unnecessarily infringe on management's prerogatives. The apparent unlimited scope of the committee's jurisdiction also has resulted in unnecessarily long and complex hearings.

2. Department director is the final authority:

The department director does not have to accept the recommendation of the hearing committee and there have been cases in which a director overturned a unanimous committee recommendation.

State employees have observed that few employees use the agency grievance procedures established by policy because the final appeal goes to the director and there is a perception that he will support his managers.

B. Appeals to the Board of Personnel Appeals:

1. Department of Highways:

It is the opinion of department attorney Jack Holstrum and Highways Personnel Administrator Russell McDonald that employees of the Department of Highways have enough avenues to air grievances without the appeal right to the Board of Personnel Appeals. These include union procedures culminating in final and binding arbitration, appeal to District Court, and filing a complaint with the Human Rights Commission, in addition to the department's grievance and discrimination complaint procedures.

Holstrum and McDonald outline the following specific problems:

a. Undefined jurisdiction of the board:

Holstrum feels that the Board assumes jurisdiction of inappropriate cases - cases with other clear avenues to provide a remedy. He cites as an example the recent case of an employee whose personal tools were stolen from a worksite and who requested reimbursement from the department. The employee took the case to the board as a grievance appeal. According to Holstrum, the proper avenues to seek a

remedy in this case would have been a tort action or a breach of contract suit filed in District Court.

b. No statute of limitations:

The time period in which an employee may bring a grievance to the board is open-ended. Holstrum pointed out that with time the facts relating to any case become obscured as memories fade and records may be destroyed.

c. Hearings officers are not attorneys:

Holstrum expressed the view that hearings examiners should be attorneys. He noted that hearings officers for other bodies, such as the National Labor Relations Board, after which the Board of Personnel Appeals patterns itself, are always attorneys.

d. Labor law is erroneously used as precedent:

The approach of the board in handling cases also created problems for the department. Holstrum said the board relies on arbitration decisions for precedent which are based on cases using a special set of rules and which are not subject to court review. Board of Personnel Appeals decisions are subject to court review, but when these cases are taken to District Court they are considered by the court based on a different set of legal rules.

e. The board interposes its judgment on management discretion:

In one case Holstrum cited, the board ordered the department to promote an employee. That case was taken to the Supreme Court which upheld management's right to make such decisions.

f. Employees need an attorney to present an appeal to the board:

Before an employee takes an appeal to the board, he is advised to seek and must incur the cost of legal assistance, Holstrum said.

The Department of Highways favors repeal of the statutes providing for appeal to the Board of Personnel Appeals and would not want such appeal rights extended via any other procedure.

Personnel Administrator McDonald summed up the department's position when he said, "We'd like to see it (a grievance) settled in the proper arena the first time, rather than go through several procedures to wind up in the same spot (district court)."

2. The Department of Fish, Wildlife and Parks:

a. Statutory limitations on appeals to District Court:

The major potential problem for Fish, Wildlife and Parks is the final sentence in the statute providing the appeal right which says, "Any order of the board is binding upon the department," according to department attorney F. Woodside Wright.

Both he and Board of Personnel Appeals Administrator Jensen said this provision could be interpreted to mean that the department cannot appeal a decision of the board to District Court.

In the handling of grievances, "having the Board as the final determining factor does influence our thinking, because we don't have any place else to go," Wright said.

The Board of Personnel Appeals could issue an order the department finds improper, burdensome or offensive because it results in an allocation of money or infringes on management discretion. For example, in one case the board ordered an employee reinstated to a particular position which the department had already filled. The department requested and received a modified order requiring that the employee be reinstated to the same or an essentially equivalent position, with the department to determine what was essentially equivalent, Wright said.

But, because the department believes there is the potential for abuse, it would like to see this particular sentence in the statute repealed.

b. Employee morale:

The existence of an outside appeal route for department employees has had a generally good effect on morale, whether or not the process is used, according to Wright. He believes that when employees perceive top management to be fair, they will accept the decision of the director as final. But, if the perception of top management is otherwise, the existence of the appeal route is reassuring to employees. The fact that 100% of all appeals to the Board of Personnel Appeals by Fish, Wildlife and Park employees were under one director bears this assertion out.

The Department of Fish, Wildlife and Parks favors retention of an outside body to hear employee appeals, but would like to see repeal of the section of statute discussed as in this section.

C. Merit System Council:

The Merit System Bureau received approximately a call per week from an employee wanting to know how to file an appeal with the council, according to Assistant Bureau Chief Pamela Wintrode. Bureau staff was able to handle most the employees' problems in the past, as reflected in the low number of appeals the council has heard. Now that the bureau is eliminated, she doubts that Job Service will have the time to deal with these employee complaints in the same manner and she anticipates an increase in appeals to the council.

VI. OTHER STATES

The following is a brief summary of grievance appeal procedures used by several other states selected to illustrate different types of appeal mechanisms.

A. Illinois:

The governor appoints a 15-member grievance board made up of employees and non-employees. When a grievance is appealed, a three-member committee is created to hear specific cases. The committee makes a recommendation to the director of personnel, who approves, disapproves or modifies the recommendation. The ruling of the director of personnel is final.

B. Indiana:

In Indiana, an employee may appeal from the decision of the agency head to the state personnel director to the State Employees Appeals Committee to binding arbitration.

C. Pennsylvania:

An employee may appeal to the Office of Administration which forms a hearing committee. The committee makes a recommendation to the Secretary of Administration, who issues a decision which is final and binding.

D. South Carolina:

The State Budget and Control Board appoints a seven-member State Employee Grievance Committee. The committee sends its recommendations to the board, which issues a decision which is final.

E. Wisconsin:

Grievances are resolved by the level of authority where a binding decision is appropriately made. If the matter is wholly within the discretion of the agency, the final step of the procedure is the head of the agency.

VII. OPTIONS

There are five basic options which the commission could consider regarding employee grievances and appeals. They are:

OPTION 1: Leave current grievance and appeal procedures as they are currently constituted.

This option continues the inequity of an administrative appeals program for employees of Fish, Wildlife and Parks, the Department of Highways and Merit System employees but not other state employees.

OPTION 2: Repeal the statutes providing appeal to the Board of Personnel Appeals for Highways, Fish, Wildlife and Parks, and to the Merit Council for Merit System employees and provide no alternative.

This option would create a consistent process for all non-organized employees and would be favored by some agencies including the Highway Department.

It has the disadvantage of jeopardizing federal funds if merit employees and applicants do not have an impartial appeal process as required by the federal merit principles. It also does not eliminate the dissatisfaction expressed by many employees with a grievance process which includes no appeal beyond the department directors.

Alternatively the Board could recommend expansion of the right to appeal to an outside body to employees of all agencies. This body could be the Board of Personnel Appeals, Merit System Council or another body especially created for this purpose. Regardless of the appeals board selected, many state managers would feel that an appeals mechanism at least has the potential of infringing on management prerogatives. The appeals process would have to be carefully defined to keep this problem at a minimum.

OPTION 3: Expand the Right of Appeal to the Board of Personnel Appeals.

Board of Personnel Appeals Administrator Jensen said the board could handle the expanded grievance appeal caseload with the addition of one or two staff members, if the trend toward reduction in the number of classification appeals continues. He strongly urges that whatever body might be designated to hear employee appeals, it be given the statutory right to enforce its orders in District Court and that a strong statutory protection against retaliation be included.

This option would make the appeals mechanism for general personnel grievance appeals consistent with the mechanism for one of the specialized grievance appeals - classification appeals. It has the disadvantage of continuing a dual general grievance

appeal process for Merit System and non-Merit System employees. It also has the disadvantage of placing the responsibilities in a Board whose expertise is labor law - a problem cited by the Highway department - and whose current composition is designed to insure that the rights of organized - not unorganized - employees are protected.

OPTION 4: Expand the right of appeal to the Merit System Council.

This option would create one uniform appeals process for general non-union personnel grievances. The expanded function would be consistent with the Merit System Council's charge to protect merit principles and provide equal protection and due process. It would involve an expansion of a current duty - hearing standard employee grievances - rather than addition of a new one that would involve mastering another area of law.

OPTION 5: Establish a new Grievance Appeals Board to hear all general non-union grievances.

This option would involve eliminating the major remaining duty of the Merit System Council (to hear grievances for Merit System employees) and effectively replace it.

However, the composition of a new board could be established to best suit the purpose. Unorganized employees could be included.

Any of the options listed here which involve expanding appeal rights would necessitate the hiring of additional staff.

VIII. ADDITIONAL INFORMATION REQUIRED

Before an informed decision can be made on an optimal grievance mechanism, several additional pieces of information are needed. Plans are currently being made to collect this information as indicated:

- A. Employee and management recommendations. (To be obtained through a survey.)
- B. Information on what kinds of grievances can be appealed to District Court both in the absence and in the presence of an administrative appeals body. The advantages and disadvantages of handling these grievances administratively where possible. (Legal research will be requested as soon as the Division's staff attorney begins employment in January.)
- C. More information on the characteristics of appeals procedures in other states that insure adequate review without unduly infringing on management prerogatives.

APPENDIX A

STATUTES ESTABLISHING THE DEPARTMENT OF HIGHWAYS' GRIEVANCE APPEAL PROCEDURE

323

STATE EMPLOYEE CLASSIFICATION, COMPENSATION, AND BENEFITS

2-18-1003

providing group benefits for employees of the Montana university system to the department.

(2) Upon transfer of the board of regents' authority as provided in (1) of this section, group benefit plans for employees of the Montana university system are subject to the provisions of this part.

History: En. Sec. 9, Ch. 555, L. 1979.

2-18-816. Annual audits of group benefit plans required. The department shall have the state employee group benefit plans established under this part, whether established on a self-funded basis or not, audited annually by either the legislative auditor or an independent certified public accountant.

History: En. Sec. 10, Ch. 555, L. 1979.

Part 9 reserved

Part 10

Grievance Procedures

2-18-1001. Highway department personnel grievances — hearing. (1) An employee of the department of highways aggrieved by a serious matter of his employment based upon work conditions, supervision, or the result of an administrative action and who has exhausted all other administrative remedies is entitled to a hearing before the board of personnel appeals, under the provisions of a grievance procedure to be prescribed by the board, for resolution of the grievance.

(2) Direct or indirect interference, restraint, coercion, or retaliation by an employee's supervisor or the department of highways against an aggrieved employee because the employee has filed or attempted to file a grievance with the board shall also be basis for a grievance and shall entitle the employee to a hearing before the board for resolution.

History: En. 32-2505.1 by Sec. 1, Ch. 377, L. 1975; Sec. 32-2505.1, R.C.M. 1947; En. 32-2505 by Sec. 2, Ch. 28, L. 1974; Sec. 32-2505, R.C.M. 1947; R.C.M. 1947, 32-2505(part), 32-2505.1.

2-18-1002. Grievance procedure — hearing — order. (1) The board of personnel appeals provided for in 2-15-1705 shall hear grievances of personnel of the department of highways.

(2) If upon the preponderance of the evidence taken at the hearing the board is of the opinion that the employee is aggrieved, it may issue an order to the department of highways requiring such action of the department as will resolve the employee's grievance. In any hearing the board is not bound by statutory or common-law rules of evidence.

History: (1) En. 32-2505 by Sec. 2, Ch. 28, L. 1974; Sec. 32-2505, R.C.M. 1947; (2) En. 32-2505.2 by Sec. 2, Ch. 377, L. 1975; Sec. 32-2505.2, R.C.M. 1947; R.C.M. 1947, 32-2505(part), 32-2505.2.

2-18-1003. Enforcement of board order — petition in district court. The board or the aggrieved employee may petition for the enforcement of the board's order and for appropriate temporary relief and shall file

APPENDIX B

STATUTE ESTABLISHING THE FISH, WILDLIFE AND PARKS GRIEVANCE APPEAL PROCEDURE

87-1-205. **Grievance procedure.** An employee of the department, aggrieved by a serious matter of his employment based upon work conditions, supervision, or the result of an administrative action, who has exhausted all administrative remedies within the department, is entitled to a hearing before the board of personnel appeals provided for in 2-15-1705 and subject to the provisions of 2-18-1011 through 2-18-1013. Any order of the board is binding upon the department.

History: En. 26-109.1 by Sec. 18, Ch. 417, L. 1977; R.C.M. 1947, 26-109.1; amd. Sec. 3, Ch. 44, L. 1979.

APPENDIX C

ADMINISTRATIVE RULES OF THE BPA GOVERNING HIGHWAY DEPARTMENT GRIEVANCE APPEALS

BOARD OF PERSONNEL APPEALS

24.26.303

Sub-Chapter 3

Department of Highways Grievances

24.26.301 PURPOSE (1) The purpose of these rules is to provide all employees of the Montana department of highways with an orderly and uniform method to file and process personnel grievances. (History: Sec. 2-18-1001, MCA; IMP 2-18-1002, MCA; NEW, Eff. 5/5/75)

24.26.302 DEFINITIONS (1) "Employee" means any person employed in the Montana department of highways.

(2) "Employee grievance" means an employee's dissatisfaction concerning a serious matter of his employment based upon working conditions, supervision, or the result of administrative action except those arising from the Classification and Wage Act, as provided in 2-18-1011, MCA.

(3) "Board" means the board of personnel appeals or its designated agent.

(4) "Working days" means all calendar days except Saturdays, Sundays and holidays.

(5) "Form" means the highway department personnel grievance form. BPA-B(1).

(6) "Quasijudicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes, but is not limited to, the functions of interpreting, applying, and enforcing existing rules and laws; granting or denying privileges, rights, or benefits; determining rights and interests of adverse parties; evaluating and passing on facts; awarding compensation; ordering action or abatement of action; adopting procedural rules; holding hearings; and any other act necessary to the performance of a quasijudicial function.

(7) "Department head" means the director of highways.

(8) "Department" means the Montana department of highways. (History: Sec 2-18-1001, MCA; IMP, 2-18-1002, MCA; NEW, Eff. 5/5/75.)

24.26.303 GRIEVANCE PROCEDURE (1) Step one

(a) An employee, group of employees, or employee representative, may utilize the formal grievance procedure, after exhausting all available informal remedies within the department of highways as set forth in the department's rules or regulations, by obtaining a personal grievance form BPA-B(1) and submitting it to the employee's immediate supervisor for consideration.

(b) The immediate supervisor shall have three working days to examine the grievance, to record his findings and to indicate support or nonsupport of the grievance on the form, and return the form to the employee.

(c) The employee shall have three working days to accept or reject the immediate supervisor's evaluation and findings by completing the appropriate section on the form, and forwarding the grievance to step two.

(2) Step two

(a) If the immediate supervisor's response is late or if the response is returned to the employee and the employee wishes to continue the grievance, the employee shall do so by submitting the form, with all appropriate sections completed, to the department head for review.

(b) The department head shall have five working days to review the grievance, to record findings in the appropriate section of the form, to indicate support or nonsupport of the grievance, and to return it to the employee.

(c) The employee shall have five working days to accept or reject the department head's evaluation and findings by completing the appropriate section of the form, and forwarding the grievance to step three.

(i) In the event the employee accepts the department head's findings and recommendation, the recommendation shall become effective upon notification to the department head by the employee.

(ii) In the event the employee rejects the department head's recommendation, the employee may submit the grievance for final resolution to step three.

(3) Step three

(a) If the department head's response is late or if the response is returned to the employee and the employee wishes to continue the grievance, the employee shall do so by submitting the form, with all appropriate sections completed, to the board of personnel appeals for final resolution.

(b) The board of personnel appeals shall have ten days from receipt of the form to conduct its inquiry and render a preliminary decision. The department and the employee shall have five days to accept or reject the preliminary decision. If the department and the employee accept the preliminary decision, it shall become the final decision. If the employee or the department rejects the preliminary decision, the board, a member of the board, or an examiner appointed by the board shall conduct a hearing in accordance with appropriate provisions of the Administrative Procedure Act within 20 days of rejection of the preliminary decision.

(c) If a member of the board or an examiner appointed by the board presides over the hearing, the member, or the examiner, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed decision together with a recommended order, which shall be filed with the board, and if no exceptions are filed within 20 days after service thereof upon the parties, or within such further period as the board may authorize, the recommended order shall become the order of the board.

(d) If the board presides over the hearing, the board shall cause to be served on the parties to the proceeding a final decision together with a final order. (History: Sec. 2-18-1001, MCA; IMP 2-18-1002, MCA; NEW, Eff. 5/5/75.)

24.26.304 FREEDOM FROM INTERFERENCE, RESTRAINT, COERCION, OR RETALIATION (1) Any employee who files a grievance or who testifies or submits evidence in any proceeding in this chapter shall be assured freedom from restraint, interference, coercion, or reprisal and if these freedoms are denied the employee through supervisory or administrative action, the employee shall be entitled to file a grievance with the board.

(2) If a grievance is filed pursuant to this rule, the board shall serve the grievance upon the department and the department shall have ten days in which to respond to the grievance. After the ten days have elapsed, the board shall commence with step three b of the formal grievance procedure provided in ARM 24.26.202. (History: Sec. 2-18-1001, MCA; IMP, 2-18-1001(2), MCA; NEW, Eff. 5/5/75.)

APPENDIX D

ADMINISTRATIVE RULES OF THE BPA GOVERNING FISH, WILDLIFE AND PARKS' GRIEVANCE APPEALS

BOARD OF PERSONNEL APPEALS 24.26.403

Sub-Chapter 4

Department of Fish, Wildlife, and Parks Grievance

24.26.401 PURPOSE (1) The purpose of these rules is to provide all employees of the Montana department of fish, wildlife, and parks with a procedure to file and process personnel grievances. (History: Sec. 87-1-205, MCA; IMP, 87-1-205, MCA; NEW, 1978 MAR p. 75, Eff. 1/25/78.)

24.26.402 DEFINITIONS (1) "Employee" means any person employed in the Montana department of fish, wildlife, and parks.

(2) "Employee grievance" means an employee's dissatisfaction concerning a serious matter of his employment based upon working conditions, supervision, or the result of administrative action except those arising from the operation of the statewide classification and pay plan as provided in 2-18-1011, MCA.

(3) "Board" means the board of personnel appeals or its designated agent.

(4) "Department head" means the director of the department of fish, wildlife, and parks.

(5) "Department" means the Montana department of fish, wildlife, and parks. (History: Sec. 87-1-205, MCA; IMP, 87-1-205, MCA; NEW, 1978 MAR p. 75, Eff. 1/25/78.)

24.26.403 GRIEVANCE PROCEDURE (1) If after exhausting the internal grievance procedure as provided by the personnel policies of the department, an employee does not believe that his grievance based upon working conditions, supervision, or the result of an administrative action has been resolved to his satisfaction, the employee may file a formal grievance with this board.

(2) To file a grievance with this board the employee shall file with this board a letter with the following information:

- (a) the employee's name,
- (b) the employee's position classification,
- (c) which division and bureau the employee works for,
- (d) a statement of what the nature of the grievance is,

and

(e) a statement of how the internal grievance procedure has been followed.

(3) Upon receipt of the letter from the employee, this board shall serve a copy of the letter on the department and a summons directing the department to submit to this board a

24.26.404

LABOR AND INDUSTRY

position paper on the grievance within ten days after the service of the letter, accompanied by certificate of service certifying that a copy of the position paper has been served on the grievant.

(4) After the ten days have elapsed from the date of service of the letter, the board may set the matter for a hearing de novo. However, upon the stipulation of both parties to the grievance, the matter may be submitted to the board for decision on the record of the proceedings before the department. (History: Sec. 87-1-205, MCA; IMP, 87-1-205, MCA; NEW, 1978 MAR p. 75, Eff. 1/25/78.)

24.26.404 FREEDOM FROM INTERFERENCE, RESTRAINT, COERCION, OR RETALIATION (1) If the department directly or indirectly interferes, restrains, coerces, or retaliates against an employee because the employee has filed or attempted to file a grievance with the board, the employee shall be entitled to file a complaint with the board.

(2) The complaint shall be in writing and shall contain a clear and concise statement of facts constituting the alleged interference, restraint, coercion, or retaliation.

(3) The board shall serve the complaint upon the department and the department shall have ten days from the date of service of the complaint upon it to respond to the complaint. The response shall be filed with this board accompanied by a certificate of service certifying that the complainant has been served with a copy of the response.

(4) After the ten days have elapsed from the date of service of the complaint, the board may set the matter for hearing. (History: Sec. 87-1-205, MCA; IMP, 87-1-205, MCA; NEW, 1978 MAR p. 75, Eff. 1/25/78.)

NEXT PAGE IS 24-1705

24-1694 7/1/80

ADMINISTRATIVE RULES OF MONTANA

APPENDIX E

ADMINISTRATIVE RULES OF THE MERIT SYSTEM COUNCIL GOVERNING GRIEVANCE APPEALS

MERIT SYSTEM COUNCIL

2.23.702

Sub-Chapter 7

Grievances and Appeals

2.23.701 GRIEVANCES (1) Each agency participating in the Montana state merit system will have a standardized procedure for processing grievances that conforms with the grievance policy and procedure set forth in ARM Title 2, chapter 21, sub-chapter 80, as amended. No employee will be allowed to file an appeal before the merit system council until such employee has exhausted the remedies as outlined in the agency grievance procedure. In the grievance procedure, the agency will stipulate a time frame for completion of each step that is not unreasonable and would not present a hardship to an employee attempting to resolve a grievance.

(2) Employees covered under a contractual grievance procedure offering binding arbitration have the right to use either the agency grievance procedure or the contractual grievance procedure, but not both. Whichever grievance procedure is selected, the employee waives the right to the other procedure. Decisions resulting from binding arbitration are final and cannot be appealed to the merit system council. (History: Sec. 2-18-105 MCA; IMP, 2-18-105 MCA; NEW, EFF. 4/5/76; AMD, 1980 MAR p. 2777, EFF. 10/17/80.)

2.23.702 APPEALS--PERMANENT EMPLOYEES (1) Permanent employees who have been reclassified, demoted, suspended, dismissed, separated through a reduction in force, denied reinstatement when the employee's previous class of position is open, or any employee who alleges that he or she has been subject to discrimination as defined in ARM 2.23.601 may appeal to the Montana state merit system council. Such appeals must be made in writing stating the basis of the appeal within 30 calendar days after the effective date of exhausting the agency grievance procedure. A hearing before the merit system council will be arranged by the chief of the merit system bureau within 15 calendar days upon receipt of the written appeal. The attorney general's model rules are modified to this extent. The council will review the record of the grievance and consider oral and written statements presented by the parties. The council reserves the right to conduct an evidentiary hearing on the merits of the grievance. The employee and the agency director will be notified reasonably in advance of the hearing and will have the right to have someone represent him/her. The decision of the council in all appeals will be final and binding upon the agency and employee, but does not preclude the agency's or employee's right to appeal the council's decision before a Montana district court as provided under the Montana

Administrative Procedure Act. Any action taken by the council is without prejudice to the employee's right to timely file a complaint of discrimination with the Montana human rights commission after the alleged unlawful discrimination occurred or was discovered. (History: Sec. 2-18-105 MCA; IMP, 2-18-105 MCA; NEW, Eff. 4/5/76; AMD, 1980 MAR p. 2777, EFF. 10/17/80.)

2.23.703 APPEALS--APPLICANTS AND ELIGIBLES (1) Applicants and eligibles who allege discrimination as defined in ARM 2.23.601 who have been found ineligible to take examinations, who fail examinations, or who have been removed from a register, may also appeal to the Montana state merit system council. Such appeal is without prejudice to the applicant's or eligible's right to timely file a complaint with the Montana human rights commission after the alleged unlawful discrimination occurred or was discovered.

(2) With the exception of discrimination as defined in ARM 2.23.601, hearings will be informal; the council need not meet as a body. The following procedures will apply:

(a) When rejected for examination, the council will review the applicant's qualifications and make a determination as to whether or not the individual will be admitted to the examination. The individual will not be admitted to any part of the examination pending the council's decision.

(b) In hearing any appeal of a rating the council will determine whether or not an error was made in scoring the candidate. If the chief of the merit system bureau is ordered to correct the applicant's rating, it will be done immediately. However, the correction will not affect certifications or appointments that have already been made from the register.

(c) When an eligible appeals a removal from a register, the chief will furnish the council all facts relating to the action. After investigation, the council will render a decision. The council's decision will not affect certifications on appointments that have already been made from the register. (History: Sec. 2-18-105 MCA; IMP, 2-18-105 MCA; NEW, Eff. 4/5/76; AMD, 1980 MAR p. 2777, EFF. 10/17/80.)

NEXT PAGE IS 2-2259